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No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. —

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v.

PITTSBURGH PLATE GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 2, 1959.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 16–31) is reported at 270 F. 2d 167. The findings of fact, conclusions of law, and order of the Board (R. 1–17) [1] are reported at 121 NLRB 758.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, pp. 31–32) was entered on September 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the Board's appendix filed in the court of appeals.

QUESTION PRESENTED

Section 9(b) of the National Labor Relations Act provides that the National Labor Relations Board shall determine "in each case whether" the appropriate unit for collective bargaining purposes "shall be the employer unit, craft unit, plant unit, or subdivision thereof." In 1954, the Board announced that it would thereafter select a craft group as an appropriate unit whenever (1) the employees for whom separate representation is sought constitute a true craft group, and (2) the union seeking to represent them traditionally represents employees of that type on a craft basis, without regard to whether the industry previously had conducted collective bargaining on an industry-wide or a plant-wide basis, or whether the plant had an integrated operation.

The question presented is whether the provision in Section 9(b) that the Board must determine the appropriate unit "in each case" precludes it from certifying a craft unit whenever the foregoing two conditions are met, and instead requires it, as the court below held, to "decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace."

STATUTE INVOLVED

Section 9(b) of the National Labor Relations Act, as amended (61 Stat. 143, 29 U.S.C. 159(b)), provides as follows:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes

of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On October 11, 1956, International Brotherhood of Electrical Workers ("Electrical Workers"), filed a representation petition with the Board, pursuant to Section 9(c) of the Act, in which it requested certification as bargaining representative of the electricians, instrument men, apprentices and helpers at respondent's Cumberland, Maryland, plant. At the time the petition was filed, respondent's Cumberland plant employees were not represented by any union. Subsequently, on November 8, 1956, respondent and United Glass and Ceramic Workers of North America, AFL–CIO ("Glass Workers") executed an agreement that provided, in substance, that an existing collective bargaining contract between respondent and Glass Workers covering respondent's other glass plants would be applicable to the production and maintenance employees at the Cumberland plant (R. 22–23; 38–42, 56–58).

At the hearing on the Electrical Workers' petition, respondent and Glass Workers, which intervened in the representation proceeding, urged that the petition

should be dismissed because the integrated nature of the company's operations rendered inappropriate any unit other than one embracing all production and maintenance employees. On May 23, 1957, the Board issued its decision rejecting this contention.

The Board applied the principle of *American Potash & Chemical Corp.*, 107 NLRB 1418, 1422—that a craft group is an appropriate unit "where a true craft group is sought and where, in addition, the union seeking to represent it is one which traditionally represents that craft." Finding, on the basis of the record as a whole, that the electricians' unit sought by the Electrical Workers consisted of a distinct and homogenous group of skilled journeymen craftsmen, and that the Electrical Workers traditionally represented employees of that type, the Board concluded that such a unit was an appropriate one for collective bargaining purposes. It accordingly directed an election among the following employees—"All electricians, including shift, shop, and electronics electricians, instrument repairmen, and apprentices for such classifications, employed at the Employer's plate glass manufacturing plant in Cumberland, Maryland"—to determine whether they wished to be represented by the Electrical Workers, by the Glass Workers, or by neither (R. 24–27).

At the election, conducted on June 19, 1957, Electrical Workers received 12 of the 21 votes cast, and Glass Workers received 9 votes. No objections having been filed by the parties to the conduct of the election, the Board, on June 27, 1957, certified Elec-

trical Workers as the bargaining representative of the employees in the craft unit (R. 7; 28–29, 36–37).

On July 5, 1957, Electrical Workers wrote to respondent, reciting its certification, and requesting that no changes be made in any of the conditions of employment of the employees in the unit except by agreement with Electrical Workers, pending execution of a contract. Respondent replied that it "does not recognize the International Brotherhood of Electrical Workers as the collective bargaining representative for any of its employees" (R. 7–9; 17–18, 29–35). Electrical Workers then filed a charge with the Board that respondent had violated the Act by refusing to bargain with it.

B. THE BOARD'S CONCLUSIONS AND ORDER

After hearing, the Board, on the basis of the foregoing facts, concluded that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the union certified by the Board as the representative of an appropriate unit of its employees. Accordingly, the Board directed respondent (1) to cease and desist from its unfair labor practice, (2) to bargain with the Electrical Workers upon request and (3) to post appropriate notices (R. 15–17).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order on the ground that "the action of the Board in formulating the policies [enunciated in *American Potash*] and in applying them in the pending case was arbitrary and discriminatory" (p. 28, *infra*). The court held that Section 9(b) of the Act precludes the

adoption of "the flat rule" of *American Potash* "that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft and that this rule is to be applied irrespective of the nature or the degree of integration in the industry and irrespective of the established practice of collective bargaining prevailing in the industry" (pp. 23–24, *infra*). The court stated that the "amended section expressly requires the Board to decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace" (p. 26, *infra*, emphasis in original). The court also noted that in *American Potash* the Board had reversed its prior decision in *National Tube Co.*, 76 NLRB 1199, in which it had held that bargaining history and integration of operations were relevant factors in determining the appropriateness of craft unions; and that after *American Potash* it had continued to apply the *National Tube* principles to the four integrated industries to which they had already been applied (pp. 29–31, *infra*); and it concluded (p. 29, *infra*) that it was "discriminatory" for the Board to refuse to apply those principles to the plate glass industry, which is also highly integrated and has an equally long history of industry-wide bargaining.

REASONS FOR GRANTING THE WRIT

1. The validity of the Board's *American Potash* principles is an issue of major importance in the administration of the Act. For nearly six years, the Board has applied these principles in determining the propriety of craft units in all industries subject to its jurisdiction (with the exception of the four where the

earlier *National Tube* doctrine (pp. 8–9, *infra*) is still applied). The decision below invalidates these principles, necessarily creates serious doubt as to the legality of the numerous bargaining units created thereunder, and is likely to have an unstabilizing effect on existing collective bargaining relations.

The problem of the principles governing the establishment of craft units has been a difficult and recurring one since the Board was created in 1935.[2] Early in the administration of the Wagner Act, the Board concluded that a history of bargaining on a plant-wide basis would automatically preclude the establishment of a craft unit (*American Can Co.*, 13 NLRB 1252). At the same time, the Board promulgated the "Globe doctrine," which permitted craft employees to determine for themselves whether they desired separate representation in a craft unit or inclusion in a plant unit, in the situation where either unit would be appropriate and there were unions seeking to represent them in either unit (*Globe Machine and Stamping Co.*, 3 NLRB 294). However, in 1947, Congress, being dissatisfied with the *American Can* principle, enacted Section 9(b)(2), which provides that the Board shall not "decide that any craft unit is inappropriate for [collective bargaining] purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in

[2] See, for example, Fourth Annual Report of the National Labor Relations Board (G.P.O. 1940), pp. 83–89; Eleventh Annual Report of the National Labor Relations Board (G.P.O. 1947), pp. 23–26; Sixteenth Annual Report of the National Labor Relations Board (G.P.O. 1952), pp. 88–91.

the proposed craft unit vote against separate representation."

In *National Tube Company*, 76 NLRB 1199 (1948), the Board concluded that this provision was merely intended to preclude it from selecting a craft unit on the ground that a larger unit had previously been established, but that it did not otherwise restrict the Board's discretion to determine whether a craft unit would be appropriate. Accordingly, in that case, involving a plant in the basic steel industry, the Board declined to sever a group of craftsmen from a production and maintenance unit, in view of the integrated nature of the plant's operation and the industry's history of bargaining on a plant-wide basis. The same principle was then applied to plants in three other industries.[3]

However, in 1954, in *American Potash & Chemical Corp.*, 107 NLRB 1418, the Board reexamined its criteria for the establishment of craft units and concluded that the policies of the Act and the purposes of Section 9(b)(2) would be better effectuated by not giving weight to the factors of integration and industry-wide bargaining history. Hence the Board announced that the *National Tube* doctrine would not be further extended, and that, in the future, craft units would be found appropriate, irrespective of these fac-

[3] *Corn Products Refining Co.*, 80 NLRB 562 (wet milling); *Weyerhaeuser Timber Co.*, 87 NLRB 1076 (lumber); *Permanente Metals Corp.*, 89 NLRB 804 (basic aluminum). At the same time, the Board, absent the factor of integration of operations, continued to direct self-determination, or "Globe," elections when a timely petition for a group of employees exercising craft skills was filed. See *Thirteenth Annual Report of the National Labor Relations Board* (G.P.O. 1948), p. 37.

tors, where separate representation was sought with respect to a true craft group and the union seeking to represent it was one which traditionally represents employees of that type. However, in order to avoid upsetting a pattern of bargaining already firmly established, the Board stated that it would "continue to decline to entertain petitions for craft or departmental severance in [the four] industries to which the Board has already applied *National Tube* and where plantwide bargaining prevails" (107 NLRB at 1422).

The effect of the decision below is to overturn the principles governing the designation of craft units that the Board has developed over the years as most likely to effectuate the policies of the Act; and in substance to require the Board to give weight to the criteria used in the *National Tube* case, which it rejected almost six years ago because they had the undesirable "effect of permanently foreclosing the possibility of establishing craft or departmental units in an entire industry by freezing that industry into an industrial unit for bargaining purposes" (*American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, 1420).[1] The correctness of a ruling that has such significant consequences plainly calls for review by this Court.

2. In holding that the Board's designation of craft units on the basis of the *American Potash* criteria violates the requirement in Section 9(b) of the Act that the Board determine the appropriate unit "in each case," the court below has failed to give proper effect to the settled rule that an agency may, on the basis of

[1] However, the court casts doubt on whether even the *National Tube* criteria could be applied pursuant to general rule. (See *infra*, pp. 30–31.)

its experience, formulate the general principles that it will follow in applying statutory criteria to particular cases. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348–349; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; Davis, *Administrative Law Treatise* (West, 1958), Vol. 2, p. 353. As long as such principles are reasonably designed to effectuate the statutory policy (and, as we show, *infra*, pp. 11–13, the Board's *American Potash* criteria meet this test), the agency may apply them without further inquiry whether their application in a particular case would or would not further that policy. Indeed, the reason for promulgating such general rules is to avoid having to make that inquiry in each case, on the theory that an agency should be able to establish general policy standards that, in the long run, it believes will best effectuate the legislative design.

The criteria for determining when a craft unit is appropriate turn largely on policy considerations which the Board formulates on the basis of insight and experience gained from many cases (see pp. 7–9, *supra*), and their validity does not depend upon the facts of any particular case. Accordingly, we submit that the Board, drawing upon its cumulative experience,[1] was fully justified in enunciating in the *Ameri-*

[1] Experience, however, was not the only basis for the Board's decision in *American Potash*. Before changing the craft unit criteria, the Board invited leading employer groups and unions to present their views. The National Association of Manufacturers, the United States Chamber of Commerce, the Ameri-

can Potash case a general rule that would henceforth apply in the establishment of craft units. The requirement in Section 9(b) that the Board decide the appropriate unit "in each case," therefore, does not preclude the Board, as the court below suggested (p. 28, *infra*) from "lay[ing] down the general rule that craft units rather than plantwide units best serve the interests of the employees and thereafter to apply the rule in subsequent cases." Cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. Indeed, even under *American Potash* the Board must still determine "in each case" whether the particular employees are members of a true craft and whether the union involved traditionally represents that craft.

3. The Board's *American Potash* principles are valid because they are designed to, and do, reasonably carry out the purpose and policy of the Act. The Board concluded after careful study that the denial

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can Federation of Labor, the Congress of Industrial Organizations, and many others filed briefs with the Board, and some participated in oral argument before the Board. The use of integration, bargaining history, and various other factors in determining the appropriateness of craft units was extensively and thoroughly examined.

Based on the record here, the Board decided that the electricians were skilled craftsmen, exercising their normal skills in their plant functions; that the Cumberland plant was sufficiently distinct from respondent's other plants so that the contract covering those plants could not be regarded as a bar to an election at Cumberland; that nothing was raised concerning integration or pattern of collective bargaining within the glass industry which had not heretofore been considered by the Board or which warranted a change in the *American Potash* policy; and that the electricians should have an opportunity to vote either for Electrical Workers or for Glass Workers (R. 23-27).

of craft units because of integration of operations or because bargaining in the industry was previously on a plant-wide basis does not adequately effectuate the purposes of Section 9(b)(2). Congress, in enacting this section, manifested "a deep concern * * * for the equities of craft employees and craft unions" (*American Potash, supra,* 107 NLRB at 1420), and intended to ease the path of craft employees to separate representation,[7] particularly in those integrated industries where the Board had previously been reluctant to establish craft units. In view of the large number of highly integrated industrial enterprises, many of which have a history of non-craft collective

[7] See, for example, the following excerpts from the legislative history of Section 9(b)(2):

"* * * Since the decision in the *American Can* case (13 NLRB 1252), where the Board refused to permit craft units to be 'carved out' from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable." (Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 12, 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 418.)

"* * * This additional guaranty—recognizing and protecting, as it does, the rights and interests of individuals and minorities—will, it is believed, through wise administration result in a substantially larger measure of protection of those rights where bargaining units are being established than has heretofore been the practice." (House Conference Report No. 510 on S. 1126, 80th Cong., 1st Sess., p. 47, 1 Leg. Hist., p. 551.)

"All this bill does is to provide that such a previous finding shall not have that effect, and that if a year later the craft people want to form a separate union they shall have the same consideration at that time as they would have had if they had taken that action when the plant was first organized. In effect I think it gives greater power to the craft units to organize separately." (Senator Taft, 93 Cong. Rec. 3836, 2 Leg. Hist., p. 1009.)

bargaining, we submit that the Board was warranted in concluding that denying craft representation on those bases would tend to nullify the intent of Congress.

The *American Potash* criteria—which guarantee separate representation to all employees who can show that they constitute a truly skilled craft group, and that the union seeking to represent them is one which traditionally represents that craft—achieve the Congressional objective, without requiring the Board to establish a craft unit whenever one is requested. Moreover, the criteria themselves are reasonably related to the policy underlying the establishment of separate craft units, namely, to afford a group of employees with separate skills and problems an opportunity to select a representative who specializes in their problems and is therefore better qualified to handle them.[8]

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[8] The court below suggested (pp. 24, 26–27, *infra*) that the *American Potash* criteria are invalid because they transfer the responsibility for determining the appropriateness of a craft unit from the Board to the employees. But it was the Board which made the basic determination that it is appropriate to select craft units whenever the *American Potash* criteria are met, and it is the Board which determines, on the basis of these criteria, whether a craft unit is appropriate in a particular case. The long established *Globe* election procedure (p. 7, *supra*) (sustained in *National Labor Relations Board* v. *Underwood Machinery Company*, 179 F. 2d 118, 120–121 (C.A. 1)) is based upon the right of employees to choose for themselves between two appropriate units. The right of employees to decide whether they wish to be represented in a craft unit is also recognized in the proviso to Section 9(b)(2) that the Board shall not decide that a craft unit is inappropriate on the ground that a different unit has been established by a prior Board decision, "unless a majority of the employees in the proposed craft unit vote against separate representation" (*supra*, p. 3).

4. The court below further erred, we believe, in concluding that the application of the *American Potash* criteria to the plate glass industry was in any event arbitrary and discriminatory in view of the continued application of *National Tube* to four other industries with characteristics similar to the plate glass industry. It is well-settled that, in enunciating a change in policy, the Board has discretion to apply it retroactively or prospectively, depending upon which alternative would better effectuate the purposes of the Act. See *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379 (C.A. 9); *National Labor Relations Board* v. *Katarik, Inc.*, 227 F. 2d 190, 191–192 (C.A. 8); *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2). When the Board decided in *American Potash* to reverse the *National Tube* policy, it was justified in further concluding to apply the new rule prospectively and, in the interest of not disturbing existing bargaining patterns, to continue to apply the old rule to the four industries which were already operating under it. Contrary to the court's view (pp. 28–30, *infra*), it was not arbitrary for the Board to refuse to extend *National Tube* to the glass industry because the Board continues to apply *National Tube* not only to old plants in the four industries, but also to new plants. Given the continued application of *National Tube* to the four industries generally, it is desirable, in the interest of certainty and ease of ad-

administration, that a uniform rule be applied to all plants therein.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 1959.

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APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 7863

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, RESPONDENT, AND UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL–CIO, INTERVENOR

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

(Argued June 17, 1959. Decided September 2, 1959)

Before SOBELOFF, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*

SOPER, *Circuit Judge:*

This petition for enforcement of an order of the National Labor Relations Board relates primarily to a determination of the Board that the electricians, including shift, shop and electronics electricians, instrument labor men and apprentices in the employ of Pittsburgh Plate Glass Company constitute an appropriate craft unit for purposes of collective bargaining at its plant in Cumberland, Maryland, although they comprise a small minority of the employees and the operations of the plant are highly integrated.[1]

[1] At the time of the Board's decision the electrical group, operating under the supervision of the plant electrical engineer, consisted of 16 shift electricians, 6 shop electricians and 2 instrument labor men. It was anticipated that there would be approximately 55 electricians when the plant came to full production and that ultimately the plant would hire approximately 600 employees.

The present proceeding was brought when the Company refused to bargain with the Union as the representative of the group and charges were filed that the Company had violated § 8(a)(5)(1) of the statute. As the result of this proceeding the Board passed an order requiring the Company to bargain with the group and now seeks enforcement of the order.

The Company's plant commenced operations on September 8, 1956, before it was completely finished. On October 11, 1956, the International Brotherhood of Electrical Workers (Electrical Workers) filed a representation petition, pursuant to § 9(c) of the Act, requesting certification as the bargaining representative of the electricians at the plant. At that time the plant employees were not represented by any union. However, on November 8, 1956, the Company and the United Glass and Ceramic Workers of North America, AFL–CIO (Glass Workers), entered into an agreement whereby an existing collective bargaining contract between the Company and the Glass Workers at all of the other flat glass plants of the Company in this country was made applicable to the production and maintenance employees at the Cumberland plant. Thereupon the Glass Workers intervened in the representation proceeding and joined the Company in urging that the petition of the Electrical Workers should be dismissed because the integrated nature of the plant's operations and the history of bargaining at the Company's other plants, and in the plate glass industry generally, rendered any bargaining unit inappropriate other than one embracing all the production and maintenance employees.

On May 23, 1957, the Board rejected this contention and issued its decision and direction of an election. It based its conclusion on its decision in *American Pot-*

ash & Chemical Co., 101 N.L.R.B. 1418, wherein it held that the rights of separate representation should not be denied to members of a craft group merely because they were employed in an integrated industry and had previously adopted a pattern of bargaining on an industrial basis. Finding that the electricians formed a distinct group of skilled journeymen craftsmen, the Board concluded that it was an appropriate unit for collective bargaining. Accordingly, it directed an election among the employees of the group at which the Electrical Workers received 12 votes against 9 votes for the Glass Workers, and was therefore certified as the bargaining representative of the unit.

The power of the Board to determine the appropriate bargaining unit in a particular plant is derived from § 9(b) of the statute, 29 U.S.C. 159(b), which provides in relevant part that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided:* That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *.

The Board had occasion to consider the relative advantages of the plant unit as opposed to the craft unit in its decision in *National Tube Co.*, 76 N.L.R.B. 1199, on April 7, 1948. The Tube Company, a wholly owned subsidiary of the United States Steel Corporation, was engaged in the manufacture and sale of steel

and tubular products at several plants in various parts of the United States. Only the plant at Lorain, Ohio, was involved in the case. The Bricklayers, Masons and Plasterers International Union of America, AFL, petitioned the Board to establish a craft unit of bricklayers and apprentices at the plant. The United Steel Workers of America, AFL, intervened and joined the Company in opposing the Bricklayers' petition. The United Steel Workers had been certified in 1942 as the exclusive bargaining representative for a multiple plant unit of the Company's production and maintenance employees and thereafter had bargained for them under a series of collective bargaining agreements following, in this respect, the pattern of collective bargaining generally in the steel industry. No unit confined to bricklayers had ever been established among the employees in any operation of the United States Steel Corporation or in any of the plants of the sixty-five other companies engaged in the production of basic steel. The Bricklayers contended that § 9(b)(2) of the Act removed from the Board's discretion not only the power to rely on a prior decision as the basis for finding a craft unit inappropriate, but also the power to find such a unit inappropriate by reason of collective bargaining history or any other circumstances upon which the Board had been accustomed to rely. The basis of this contention consisted of various statements found in the legislative history preceding the passage of the amendment of the Act. The Board overruled this contention on the ground that the proviso was not ambiguous and did not limit the Board's discretion to find a craft unit inappropriate so long as there was no reliance on a prior Board determination. It therefore held that the legislative history was not controlling; but it also held, upon an examination of the legislative

history, that "there is no basis for finding a Congressional intent to prohibit the use of a prior Board determination or any bargaining history based thereon as a factor to be considered so long as neither is made the sole ground upon which the Board predicates its decision." Coming to the merits of the case, the Board concluded that the bargaining history of an industry was a "weighty factor" to be considered by the Board in making its decision. It found that the bricklayers in the plant, unlike usual craft maintenance employees, were engaged in a definite program of replacing and repairing instrumentalities used in the continuous production of basic steel and that their functions were therefore intimately connected with the steelmaking process. It also found that the bricklayers and steel production employees enjoyed similar working conditions and had been represented together under a series of bargaining agreements between the employer and the United Steel Workers and that, because of the integrated nature of the operations in the industry, any change in the unit governing the bargaining relations between the employer and its employees would be detrimental to the basic wage-rate structure underlying the operations and would necessarily have an adverse effect upon the productive capacity in an industry of national concern. It therefore denied the Bricklayers' petition for separate representation.

Subsequently the Board made similar rulings affecting three other integrated industries, that is, the wet milling industry in *Corn Products Refining Co.*, 80 N.L.R.B. 362, Nov. 18, 1948, the lumber industry in *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 1076, Dec. 16, 1949, and the aluminum industry in *Permanente Metals Co.*, 89 N.L.R.B. 804, April 27, 1950. In each of these cases the Board emphasized the need for col-

lective bargaining on an industrial basis where the industry involved is highly integrated and its basic operations are interdependent.

On March 1, 1954, however, in *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, the Board reversed this policy. This case involved an employer engaged in the manufacture of various basic chemical products by a continuous flow process and the operations demonstrated the same type of integration as was found to exist in basic steel. The United Mine Workers of America (AFL) had been the bargaining representative of the employees on a plantwide basis since 1941 and the continuance of a plantwide bargaining unit was sought by the employer and certain other unions. Separate bargaining units, however, were sought by other unions for the electricians, the engineering department, the pump packers and oilers, the riggers, and the tool room keepers. In considering these conflicting contentions, the Board referred to its decision in the *National Tube* case and held that it had had the effect of permanently foreclosing the possibility of establishing craft units in an entire industry by freezing the industry into an industrial unit for bargaining purposes, and it concluded that this result was inconsistent with the legislative intent manifested in § 9(b)(2) of the statute. The Board found it necessary to re-examine the legislative history and in so doing came to a conclusion directly opposite to that which it reached in *National Tube*. It held that Congress had taken the position that the specific interests of members of a skilled craft outweigh the community of interests that exist among employees in general, and that the right of separate representation should not be denied the members of a craft group merely because they are employed

in an industry which involves highly integrated product processes and in which the prevailing pattern of bargaining is industrial in character. It announced that it would not extend the practice of denying craft severance on an industrywide basis.

In overruling its decision in *National Tube*, the Board said:

> In adopting this new rule, we have given grave consideration to the argument of employer and union groups that fragmentation of bargaining units in highly integrated industries which are characteristic of our modern industrial system can result in loss of maximum efficiency and sometimes afford an opportunity for jurisdictional disputes as to work assignments. We are cognizant of the disruptive economic and social conditions that can and sometimes do occur as the result of craft existence in industrial plants, as where, for example, a small cohesive craft group, by striking, closes down a large industrial plant employing thousands of workers. The alternative, however, is to deny crafts separate representation, and experience has shown that this approach, which was predominant under the *American Can* decision,[2] was no less productive of labor unrest.
>
> The lesson which we draw is that, consistent with the clear intent of Congress, *it is not the province of this Board to dictate the course and pattern of labor organization in our vast industrial complex. If millions of employees today*

[2] In that decision (13 N.L.R.B. 1252), the Board held that a history of bargaining in a plant-wide unit might, *of itself*, provide sufficient basis for denying a subsequent request for separate craft representation. The limitation in Section 9(b)(2) of the amended Act (p. 6, supra) reflects Congress' disapproval of this practice. See Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 417–418, 1009.

feel that their interests are better served by craft unionism, it is not for us to say that they can only be represented on an industrial basis or for that matter that they must bargain on strict craft lines. All that we are considering here is whether true craft groups should have an opportunity to decide the issue for themselves. We conclude that we must afford them that choice in order to give effect to the statute. Whatever may be lost in maximum industrial efficiency, and experience has not shown that this loss is measurably greater than that which flowed from the rigid doctrine of *American Can*, is more than compensated for by the gain in industrial democracy and the freedom of employees to choose their own unions and their own form of collective bargaining. [Emphasis supplied.]

In adopting our new rule, we wish to make it clear that the requirement that the unit sought to be severed must be a true craft group will be rigidly enforced in cases where severance is sought on that basis. We propose to exercise great care in making certain that in the administration of this rule only groups exercising genuine craft skills will be embraced within the ambit of the rule; and that the requirements will not be relaxed over a period of time. We feel that the problem is one of administration rather than concept. We are also of the opinion that under the rule we are adopting fewer groups will be severed but that, at the same time, the principle of craft independence will be maintained.

We understand this decision to mean, as pointed out by a dissenting member of the Board, that the Board has adopted the flat rule that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft and that this rule is to be applied

irrespective of the nature or the degree of integration in the industry and irrespective of the estalished practice of collective bargaining prevailing in the industry. Moreover, we understand that this rule has been adopted in deference to the views expressed on the floor of Congress when § 9(b)(2) of the Act was under consideration by that body, and in deference to the wishes of craft employees who feel that their interests are better served by craft unionism, and that the interests of millions of employees who prefer to bargain on a plant-wide basis are not to be taken into consideration. Indeed, the Board seems to abdicate its authority in the premises, for it says that "under the circumstances indicated, * * * it is not for us to say that they [the craftsmen] can only be represented on an industrial basis or for that matter they must bargain on strict craft lines. All that we are considering here is whether true craft groups should have an opportunity to decide the issue for themselves. We conclude that we must afford them that choice in order to give effect to the stafute."

In subsequent decisions, the Board has repeatedly adhered to this policy. If in a given case it is shown that certain employees are members of a craft and desire to be represented by an appropriate craft union, that is the end of the matter. No other evidence is considered and the wishes of the craftsmen are given effect, unless indeed it appears that the plant is engaged in one of the four favored industries referred to above. See *U.S. Smelting Refining & Mining Co.*, 116 N.L.R.B. 661, 663; *Bay City Division, Dow Chemical Co.*, 116 N.L.R.B. 1602, 1605; *General Refractories Co.*, 117 N.L.R.B. 81, 83; *Bethlehem Pacific Coast Steel Corp., Shipbuilding Division*, 112 N.L.R.B. 579, 581.

The decision of the Board follows the same pattern in the case at bar. Rejecting the contention of the Company and the Glass Workers that the petition to recognize the electricians as a separate craft unit should be dismissed because of the integrated nature of the Company's operations and the previous pattern of collective bargaining on an industrial basis in the flat glass industry, the Board said:

> * * * We find no merit in this contention. In *American Potash & Chemical Corporation*, 107 N.L.R.B. 1418, the Board clearly stated that it will not further extend the National Tube doctrine beyond those industries in which it had already been applied, and recently the Board has reiterated this policy on several occasions. Moreover, there is nothing raised herein concerning integration or pattern of collective bargaining within the glass industry which has not been heretofore considered by the Board, or which warrants a change of our established policy.

The departure of the Board from established principles in this new approach is manifest. The Board was right, in the first instance, in reaching the conclusion that the addition of subsection 2 of § 9(b) created no ambiguity. As amended § 9(b) does not strip the Board of its original power and duty to decide in each case what bargaining unit is most appropriate to assure to the employees the fullest freedom in collective bargaining, whether it be an employer unit, craft unit, plant unit or subdivision thereof. It merely tells the Board that it must not decide that a craft unit is inappropriate in a particular case on the ground that a different unit had been established by it in a prior determination. In effect it frees the Board from the domination of its past decisions and directs it to reexamine each case on its merits and leaves it free to select that unit which it

deems best suited to accomplish the statutory purposes. Undoubtedly the legislative debates and the committee reports indicated dissatisfaction on the part of members of Congress with the rigid attitude of the Board in adhering to its prior decisions; but Congress clearly did not command the Board, as it could have done,[3] to establish a craft bargaining unit whenever requested by a qualified craft union, or relieve the Board of its duty to consider the interests of the plant unions and the wishes of the employees who desire to bargain on a plantwide basis. The amended section expressly requires the Board to decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace.

The Board was not authorized by the amendment to surrender to anyone else its statutory duty to determine in each case the appropriate unit for collective bargaining. It had been set up by Congress as an independent body presumed to possess expert knowledge and wisdom in the field superior to that of the courts or of Congress or of the active participants in the industrial world and therefore better fitted than anyone else to decide what would best serve the working man in his effort to bargain collectively with his employer, and what would best serve the interest of the country as a whole. Yet, as we have seen, the Board declared in *American Potash* that it was not for it to say whether the employees should be represented on an industrial basis or must bargain along

[3] During the Senate hearings representatives of labor unions urged that § 9(b) be amended to require the establishment of craft units in all cases unless a majority of the craftsmen involved decided otherwise. See Hearings Before Senate Committee on Labor and Public Welfare on S. 55, 80th Cong. 1st Sess., p. 1007 et seq. and p. 1052; 2 Leg. Hist. of Labor Management Relations Act (1947) p. 1009.

strict craft lines, but that it must allow the employees the right to make the choice. In other words, the Board now reads into the statute the amendment urged upon but rejected by Congress. This does not seem to be a proper exercise of the duty of the Board to select an appropriate bargaining unit. In *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 156, involving the same employer now before us in the instant case, the Court sustained the Board in overruling the wishes of a large majority of the employees in one of the Company's plants who desired to be represented by their own union and in holding that a single organization should represent the employees in all of the Company's plants. The Court said:

> * * * the availability of a workers' organization for purposes of representation is not in itself decisive in determining the appropriate bargaining unit. Naturally the wishes of employees are a factor in a Board conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. * * *

There can be no doubt as to the breadth of the Board's power and discretion to select the appropriate bargaining unit for the employees in each case. The determination rests in the sound discretion of the Board and will not be disturbed unless it is arbitrarily and unreasonably exercised. *May Department Stores* v. *N.L.R.B.*, 326 U.S. 376, 380; *N.L.R.B.* v. *Libbey-Owens-Ford Glass Co.*, 4 Cir., 241 F. 2d 831, 834.[1]

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[1] This case related to the libre glass industry and there was no showing that this industry is integrated as is the flat glass industry involved in the case at bar.

Moreover, it has been held that the Board may, in its discretion, change its policies from time to time in order to effectuate the purposes of the Act. *N.L.R.B.* v. *Kobritz*, 1 Cir., 193 F. 2d 8; *N.L.R.B.* v. *National Container Corp.*, 2 Cir., 211 F. 2d 525, 534; *Optical Workers* v. *N.L.R.B.*, 5 Cir., 227 F. 2d 687, 691; *N.L.R.B.* v. *Stanislaus Implement Co.*, 9 Cir., 226 F. 2d 377, 378. The Supreme Court has said that administrative agencies have the choice, in their informed discretion, to proceed by general rule or by ad hoc decisions. *Securities Exchange Commission*, 332 U.S. 194, 200–203; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 348. Hence the Board contends that it had the power in the *American Potash* case to lay down the general rule that craft units rather than plantwide units best serve the interests of the employees and thereafter to apply the rule in subsequent cases. Such a rule or policy, it has been said, is formulated in the exercise of the legislative power of the Board as distinguished from its adjudicative function of finding the facts of a particular case. See 2 Davis, *Administrative Law*, p. 353.

It is obvious, however, that the Board may not be arbitrary in the exercise of its functions to promulgate a policy applicable to any class of cases. That was strikingly shown in the decision of the Supreme Court in *Office Employees International Union* v. *N.L.R.B.*, 353 U.S. 313, where it was held beyond the power of the Board to refuse to assume jurisdiction over an entire class of employers consisting of labor unions actively engaged as employers of workers. See also *Hotel Employees* v. *Leedom*, 358 U.S. 99.

In our opinion the action of the Board in formulating the policies described above and in applying them in the pending case was arbitrary and discriminatory. Instead of selecting an appropriate bargaining union

after a study of the circumstances of the case before it, it followed its announced policy of acceding to the wishes of a small group of employees, comprising a craft, for separate representation, although potent reasons existed for the plantwide representation desired by the employers and the great majority of the workers. Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board in denying craft representation and directing plantwide representation under precisely similar circumstances in certain selected fields.

We find no reasonable explanation for the discrimination. The exclusion of the steel, lumber, aluminum, and wet milling industries from the craft union rule was based by the Board on two facts: first, that in each case the industry was thoroughly integrated and second, that it had had a long history of plantwide bargaining. But precisely the same conditions exist in the plate glass industry, with which we are now concerned, since it is as much if no more integrated than those in the favored group and has an unbroken history of plantwide bargaining. The Board itself makes no attempt to distinguish between it and the favored group. It excuses its discrimination on the ground that it had previously approved plantwide bargaining in each of the four and that "it would not be wise or feasible to upset a pattern of bargaining already firmly established." This argument however defeats itself, for the pattern of plantwide bargaining in the plate glass industry is as firmly established as in any other and if it is disrupted by the automatic extension of craft union bargaining, the ensuing confusion and disturbance of industrial

peace are as likely to occur as they would be in the industries which the Board protects.

This discrimination in favor of the four industries cannot be passed over as past history which cannot now be corrected, for the Board persists in denying craft representation in the selected four in new cases that come before it. A recent summary of the Board's rule is found in its Twenty-Third Annual Report for the Fiscal Year Ended June 30, 1958 at pages 35–36 as follows:

> The Board announced during the past year that the *National Tube* doctrine, under which separate craft or departmental representation had been denied in certain industries, viz. basic steel, basic aluminum, lumber, and wet milling, is applicable not only in the case of plants with a prior industrial bargaining history but also where new plants in those industries are involved.
>
> However, adhering to the policy announced in the *American Potash* case, the Board has again declined to extend the *National Tube* doctrine and has permitted separate craft or departmental representation, regardless of integration of operations, in all industries other than basic steel, basic aluminum, lumber, and wet milling. [Footnotes omitted.]

Plainly the new plants bear the same relation to the older plants of the four industries as the Cumberland plant bears to the older plants of the Pittsburgh Plate Glass Company; but here again the Board offers no explanation for its inconsistent actions. Its policy with respect to the four industries is solely based, so far as we can see, on its prior determination that in these industries craft representation will not be tolerated. This position is not only open to the objections hereinbefore outlined, but plainly constitutes a violation of the

express provision of § 9(b)(2) of the statute, which forbids the Board to decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination.

We reach the conclusion that the Board's order should not be enforced, and have no occasion to consider the additional defense of the Company that enforcement of the order should be denied because one of the officers of the local union failed to file the affidavit required by § 9(h) of the statute.

Enforcement Denied.

United States Court of Appeals for the Fourth Circuit.

No. 7863.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

PITTSBURGH PLATE GLASS COMPANY, RESPONDENT, AND UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL–CIO, INTERVENOR

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Pittsburgh Plate Glass Company, its officers, agents, successors and assigns, on the 4th day of September, 1958, in proceedings before the Board entitled "Pittsburgh Plate Glass Company, Employer and International Brotherhood of Electrical Workers, AFL–CIO, Petitioner, Case No. 5–RC–2088", and Pittsburgh Plate Glass Company and International Brotherhood of Electrical Workers, AFL–CIO, Case No. 5–CA–1208"; upon the answer of respondent; motion of

United Glass and Ceramic Workers of North America, AFL–CIO, for leave to intervene; answer of United Glass and Ceramic Workers of North America, AFL–CIO; the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the motion for leave to intervene be, and it is hereby, granted; and that the petition for enforcement filed by the National Labor Relations Board in this cause be, and the same is hereby, denied.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.

Filed Sept. 2, 1959.

R. M. F. WILLIAMS, Jr.,
Clerk.

A true copy.
Teste:

RICHARD M. F. WILLIAMS, Jr.,
Clerk, U.S. Court of Appeals
for the Fourth Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1960